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Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mrs. FLORES (Uruguay)
(Vice-Chairman)

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The meeting was called to order at 4.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95 and A/47/441-S/24559)

1. Mr. TSEPOV (Russian Federation) said that the International Law Commission had considered all aspects of the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. The decision to set up a Working Group with the mandate not only to consider and analyse the various aspects of the issue but also to draft concrete recommendations had made it possible to formulate precisely a number of basic proposals which were necessary for further work on the question and which were reproduced in paragraph 396 of the Commission's report (A/47/10).

2. The Russian Federation fully endorsed the conclusion of the Working Group that an international criminal court should be created by a statute in the form of an international treaty. In his opinion, such a court would make it possible to interpret the Code of Crimes against the Peace and Security of Mankind in a more objective and uniform manner. However, it was important that States should be able to choose to become parties to the court's statute without at the same time becoming parties to the Code or recognizing the two texts at the same time. Likewise, his country believed that the court should not, at least in the beginning, be a permanent organ, but rather a flexible instrument or specialized mechanism which could be set in motion by States as necessary.

3. The fact that the Commission believed that the court should not have mandatory or exclusive jurisdiction showed that it had taken a balanced and pragmatic approach which would be likely to encourage the accession of as large a number of States as possible. It was also necessary for the court to have jurisdiction with respect to individuals and not States, at least for the first stage of its operations. Such an arrangement would thus be in full accord with the method adopted by the Commission with regard to the draft Code of Crimes against the Peace and Security of Mankind.

4. As the report had made clear, the Commission's examination of the jurisdiction ratione materiae ultimately revolved mainly around the question of the relationship between the draft Code and the future statute of the international criminal court. The jurisdiction of the court should be limited to crimes of an international character which were recognized by international conventions already in force, including crimes defined by the Code. In other words, the court's jurisdiction could be based as much on the provisions of the Code as on other international legal instruments relating to the culpability of individuals who had committed crimes of an international character; what was essential was that jurisdiction should not be confined exclusively to the provisions of the Code.

(Mr. Tsepov, Russian Federation)

5. With respect to the question of the jurisdiction of the international criminal court regarding various categories of international crimes, Russia believed that it would be easier to reach a solution if States recognized the right to accept the jurisdiction of the court for certain crimes only.

6. The Russian delegation agreed that it would be better not to establish a direct connection between the question of the creation of an international criminal court and the completion of work on the draft Code of Crimes against the Peace and Security of Mankind. In the absence of such a connection, a delay on the first question would not automatically entail a delay on the second.

7. His delegation believed that once the Commission had completed its consideration of the question of the establishment of an international criminal court, it then fell to the General Assembly to confer a new mandate on the Commission which would consist in formulating a detailed draft statute and not in any more general or exploratory studies of the question.

8. Diverse and sometimes diametrically opposing views had been expressed regarding the question of the eventual establishment of an international criminal jurisdiction. The Russian Federation believed that it would be well worth the effort to continue work on that question and therefore to entrust the Commission with the task of elaborating the statute of an international criminal trial mechanism with the understanding, of course, that in doing so it would give due consideration to the characteristics of the world's main legal systems and to the comments and observations that Member States would submit in writing.

9. Mr. O'BRIEN (New Zealand) commended the Commission for having taken a new approach to the controversial question of the establishment of an international criminal court. Henceforth there would be general agreement on that subject and every opportunity should be taken to permit the Commission to fulfil its general function which was to ensure the progressive development of international law and to proceed in its work in an expeditious manner. The Commission's new approach did raise, however, a number of technical legal issues, some of a fundamental kind, such as the voluntary acceptance of the court's jurisdiction. The international community should therefore think through all of the implications of the new approach, without permitting itself to be influenced by contemporary crisis situations, however tragic they may be. In order to arrive at a solution that would stand the test of time, it was important to take a long-term and dispassionate view.

10. If the concept of international criminal jurisdiction was to be accepted by as large a number of States as possible, it was necessary to be flexible in determining the possible structure of an international criminal court. It may be that the creation of a permanent organ was not justified, and the Commission had undoubtedly shown creativity in its suggestion to create a mechanism which, once triggered, would lead to the immediate convening of an

(Mr. O'Brien, New Zealand)

ad hoc body whose composition would be determined strictly by the needs of each particular case.

11. New Zealand also noted the creative recommendations of the Commission regarding the jurisdiction of the court. His Government saw no need to establish a connection between the draft Code of Crimes against the Peace and Security of Mankind and the Criminal Code. Although progress towards completion of both sets of draft articles would be concurrent, the establishment of the court should not necessarily be subject to the adoption and entry into force of a Code.

12. With regard to the question of determining which crimes were to be subject to the court's jurisdiction, it might be better to adopt an evolutionary approach in which the court's jurisdiction would extend to international crimes specified in existing international treaties. Obviously, the Code of Crimes against the Peace and Security of Mankind would be among those instruments, as soon as it entered into force. A less disciplined approach, such as including, for example, crimes defined by international law in general but not by any specific treaties, could lead to uncertainty and could prevent the principle of international criminal jurisdiction from receiving the broad acceptance which it would need in its preliminary stages if it was to evolve and develop further.

13. New Zealand expressed its wish that the Commission's work on the establishment of an international criminal court should make rapid progress. To that end, the Commission should continue to consider separately the various aspects of the complex issues involved. It was also important that the Commission should receive as broad support as possible for its future work, and he hoped that the Sixth Committee would agree on a draft resolution to that effect.

14. Mr. VAN LIEROP (Vanuatu) said that law was constantly changing and that although Vanuatu was remote from traditional seats of power, it was part of the modern world. Just like economic activity, criminal activity had become internationalized and affected the islands of Vanuatu as much as the rest of the world.

15. Vanuatu was among those countries that believed there was a compelling need seriously to consider the possible establishment of an international criminal court. The unlawful traffic in drugs put the sovereignty of small countries at serious risk. The billions of dollars at the disposal of international criminal organizations made it very difficult for small island developing countries adequately to address the threat posed to them by the drug syndicates.

16. The difficulties of a small country such as Vanuatu were clear. Apprehending a major trafficker, trying him and then imprisoning him for a long period would pose major difficulties or even undermine the country's

(Mr. Van Lierop, Vanuatu)

financial and social stability. Hence the interest of an international criminal court that would try not only traffickers but also their accomplices, as well as individuals accused of war crimes or genocide, mercenary activities, arms trafficking or other violations of constantly evolving international criminal jurisprudence.

17. It was true that the idea of an international criminal court raised many problems that would have to be considered, analysed and resolved if the court was ultimately to achieve universal acceptance. No particular State would purposely expose its citizens to confusing rules of procedure or to standards of justice that were appreciably different from those to which they had come to expect. Nor could the citizens of a country be expected voluntarily to surrender the individual rights and protections. There was always a delicate balance of power that had to be observed between the State and the individual. Each delegation should weigh up those important considerations, especially those that concerned national sovereignty, when considering the issue.

18. His delegation none the less believed that none of those obstacles was insurmountable. The court should be established by a statute in the form of a multilateral treaty between States parties. Initially, its jurisdiction should be limited to individuals. It should also be limited to crimes of an international character defined in specified international treaties in force, including the Code of Crimes against the Peace and Security of Mankind, upon its adoption and entry into force. Lastly, the court's jurisdiction should be based on the consent of the States parties concerned.

19. The ad hoc mechanism advocated by the Commission should not lead to selective prosecutions. The individuals brought before the court should be able to count on its impartiality, independence and due process of law. For that reason it was vital to ensure that all countries would be capable of participating on an equal footing. An examination should be made of the means of helping those States which, due to economic circumstances, might not be in a position effectively to participate in proceedings in cases where they had consented to jurisdiction.

20. His delegation unreservedly supported the proposal to give the Commission a fresh mandate to allow it to continue its work on that very important topic.

21. Mr. SHI Jiuyong (China), speaking on chapter III of the report of the International Law Commission (A/47/10) entitled "State responsibility" recognized that although the Commission had not adopted the draft articles on the substantive consequences of an internationally wrongful act, it had made considerable progress in its work on the topic.

22. Within the set of problems connected with "State responsibility" the question of "countermeasures or instrumental consequences" was both complex and controversial. Generally speaking, his delegation agreed to the comments

(Mr. Shi Jiuyong, China)

on the status of "countermeasures" in the law of State responsibility as contained in paragraph 124 of the report. It also agreed to the paragraphs related to points raised in paragraph 124.

23. Even without attempting to determine whether countermeasures belonged to rules of general international law, one point was worth noting: if countermeasures did belong to rules of general international law, they could be codified and adapted to the new realities; on the other hand, if they did not belong to the rules of general international law, and yet the international community had a real need for them, the Commission could, in accordance with its Statute, formulate rules of countermeasures as part of its mission progressively to develop laws. It would be the responsibility of the Sixth Committee to endorse them. However, the crux of the matter was that in either case - codification or progressive development - the formulation of rules on countermeasures would be beset with difficulties and become bogged down.

24. At the present stage of development of the international community it was not possible to set up a law-enforcement organ comparable to what existed under domestic law. Under those circumstances, it was understandable that an injured State could only resort to self-help to compel the wrongdoing State to stop its wrongful acts and compensate it. Of course, there was no question of the injured State using force, exerting political and economic pressure, interfering in the other State's internal affairs or in any way violating its sovereignty. Moreover, countermeasures should not be disproportionate.

25. The question was not so simple if the history of countermeasures and the current reality of international relations were taken into consideration. Countermeasures might be feasible as a regime of international law among States whose powers were basically balanced. However, if there were considerable differences of power between States, countermeasures frequently represented power politics under the guise of equality and it was the powerful States that used them as an instrument to bully weak States. For many developing countries, countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy, as the Commission had noted in paragraph 124 of its report. It was sufficient to remember how in bygone days the great Powers ensured the diplomatic protection of their nationals abroad.

26. Another difficulty involved in the codification and progressive development of countermeasures was that although States were theoretically equal before the law, it was rare for small or weak States to be able to adopt with any hope of success any countermeasures against the great Powers, as it would unfailingly be to their own detriment. There was yet another difficulty, as the existence of an internationally wrongful act was the prerequisite for any countermeasure. The problem was determining the existence of such an act. As was stressed in paragraph 168 of the Commission's report, if such a decision was taken by the allegedly injured State, that would be to the advantage of the more powerful States. The

(Mr. Shi Jiuyong, China)

wrongdoing State could then claim to be the victim, and the actual victim could become the State accused of wrongful acts. If the decision were taken by a third party, the development of rules and countermeasures no longer seemed necessary. Allowing a third party to determine the existence of an internationally wrongful act was in itself an extremely difficult and complicated issue, that could hardly be resolved under that topic.

27. His delegation appreciated the fact that, in his draft articles on countermeasures, the Special Rapporteur had tried his best to reduce the concern caused by the unequal balance of power. Regrettably, the proposed draft articles not only did not eliminate the concerns of the developing countries but were also to a certain degree impractical. For example, while it was assumed that it was necessary to formulate rules on countermeasures, the proposed draft article 12 provided that an injured State should not resort to countermeasures before all the amicable settlement procedures available under general international law, such as the Charter of the United Nations, were exhausted. The article might be applicable to certain situations, such as international trade disputes, but not to others. In certain situations, it might be important to adopt countermeasures in time in order to prevent further aggravation of the injury caused. It might also be necessary to prevent the wrongdoing State from deliberately using the procedure of peaceful settlement as a delaying tactic allowing it to persist in wrongful acts.

28. Draft article 13 provided that countermeasures should not be out of proportion to the gravity of the internationally wrongful act and the effects thereof. That article, though in principle correct, was too abstract and relied not on objective criteria but on rational judgment alone, which in turn depended on the free will of the State taking countermeasures. The question as to whether the proportionality of countermeasures should be related to the objectives sought also needed study.

29. The Commission could not turn a blind eye to the practical significance of countermeasures in contemporary international relations, but the legal rules governing them should be both practicable and able to prevent them from becoming legal instruments for power politics. At the current juncture, it was still difficult to resolve the contradiction between those two requirements. The Commission should therefore exercise the utmost caution in dealing with countermeasures. A bad law was often more undesirable than no law at all.

30. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, welcomed the substantial progress achieved during the Commission's last session, which had made it possible to form a clearer idea of the structure of Part Two of the topic: State responsibility. Articles 6 to 10 of Part Two, which dealt with the material consequences of an internationally wrongful act, were still provisional and not reproduced in the report, but the statement by the Chairman of the Drafting Committee on those articles was highly recommendable reading and it could be hoped that a final version would be

(Mr. Lehmann, Denmark)

arrived at in 1993. The next group of articles related to the sensitive subject of "countermeasures" or "reprisals".

31. A full treatment of the topic would probably require a Part Three on the implementation of international responsibility. It would be advisable to prepare an outline for the Commission's next session since, if a mandatory system of dispute settlement was foreseen in respect of State responsibility, it would certainly have an impact on the chapter concerning countermeasures.

32. The Nordic countries agreed with the Commission that countermeasures were a reflection of the imperfect structure of the international society, which had not yet succeeded in establishing an effective centralized system of law enforcement. When such a system did exist, as was the case in individual national societies, there was no reason for the individual to take the law into his or her own hands. In the international society, such a system did not exist and it was difficult, therefore, to avoid the use of countermeasures which were firmly founded in customary international law. It was important, therefore, to strengthen the safeguards against abuses and to draft a strictly codified regime of countermeasures.

33. When the concept of "countermeasures" was analysed, two main conclusions could be drawn: first, there was no room for countermeasures where a mandatory system of dispute settlement existed; secondly, the use of force was not a legitimate means of enforcing one's own right. A distinction must be made between countermeasures in time of peace and countermeasures in time of war. It would be advisable to use that term for enforcement acts taken unilaterally by a State in time of peace and use the more pejorative term "reprisals" for time of war.

34. In the view of the Nordic countries, countermeasures should not be seen as having a punitive function but rather as a remedy designed to induce the wrongdoing State to resume the path of lawfulness. An extremely cautious approach should be taken since, in many instances, the powerful countries were the only ones with the means to avail themselves of the use of countermeasures to protect their interests.

35. In line with that cautious approach, the Nordic countries believed it would be better to merge articles 11, 12 and 13 into one article with the heading "Conditions of resort to countermeasures", which would start out by stating the cases in which it would be lawful to resort to countermeasures. Resort to countermeasures would then be conditional upon (a) the existence of an internationally wrongful act; (b) the prior submission by the injured State of a protest combined with a demand for secession and/or reparation; (c) the exhaustion of amicable settlement procedures; (d) appropriate and timely communication of the intention to resort to countermeasures; and (e) the principle of proportionality. A second article would deal with prohibitive measures, along the lines of article 14 proposed by the Special Rapporteur.

(Mr. Lehmann, Denmark)

36. With regard to the question of countermeasures in the context of articles 2, 5 and 6 of Part Two, already adopted in first reading, the Nordic countries saw no merit in reopening the debate on articles already adopted, the formulation of which was sufficiently broad to allow for each case to be determined on its own merits.

37. In conclusion, he raised two points which were in his view linked to State responsibility. The first was the distinction between crimes and delicts in the context of countermeasures, a distinction which pointed towards a close relationship between the question of State responsibility and the draft Code of Crimes. The Commission should therefore keep progress on the two texts in step. The second was that of international liability, even though in that case the link with the subject under consideration was less close. In any event, it should be kept in mind that the three topics were interrelated and covered the whole range of State responsibility from full-fledged crime to strict liability.

38. Mr. CALERO-RODRIGUES (Brazil) said that the excellent collaboration between the International Law Commission and the Drafting Committee had resulted in completion of the draft articles relating to the substantive consequences of internationally wrongful acts which, while very important, were relatively easy to determine.

39. The ground was far less solid with regard to "instrumental" consequences, also known as "countermeasures", a formulation which had been considered preferable to "reprisals", "sanctions" or "measures of retorsion". The Special Rapporteur had defined countermeasures as measures that a State might take in response to breaches of international obligations causing injury to that State. Countermeasures themselves could be considered as violations of international obligations; however, as established in article 30 of Part One of the draft articles, wrongfulness was precluded where the countermeasures were taken in response to an internationally wrongful act committed by another State. While the definition proposed by the Special Rapporteur was technically unimpeachable, it might be asked whether it was not one-sided as it referred only to the aspect of non-compliance with an obligation. Moreover, the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and confirmed that resort to countermeasures was an admission of the inadequacy of the international legal order.

40. It was a fact that States were unequal in size, wealth and strength. Yet, before the law and by virtue of the principle enshrined in the Charter of the United Nations, all States were, or should be, equal. Recognizing and codifying the legitimacy of countermeasures meant denying the equality of States and actually heightened their inequality. How could it be expected that any countermeasures which might be taken by a small State against a much stronger State could force that latter State to cease its wrongful conduct? Thus, while the Brazilian delegation understood the position of those members

(Mr. Calero-Rodrigues, Brazil)

of the Commission who were resolutely opposed to including a chapter on countermeasures in the draft articles on State responsibility, it did not necessarily hold the same view. For the time being, it had to be recognized that countermeasures, despite their shortcomings, had to be incorporated in any legal regime on State responsibility, in the hope that a more equitable system for taking effective action against internationally wrongful acts might one day be devised. What counted was to codify countermeasures in such a way as to limit as much as possible the iniquitous consequences to which they might give rise.

41. In that context, the issue of the exhaustion of peaceful settlement procedures was of fundamental importance. Determination of the existence of an internationally wrongful act should not be left entirely to the discretion of the allegedly injured State. Another important condition for resort to countermeasures was that the allegedly injured State should inform the State concerned of its intention to use countermeasures against it. States should not in fact be taken by surprise; they should be given time to consider the situation and, when appropriate, to call a halt to their actions.

42. The primary purpose of countermeasures was to compel States to respect their obligations. If that purpose could be achieved through means such as peaceful settlement or voluntary action on the State's part, there was no reason to resort to countermeasures. Accordingly, the articles relating to countermeasures should state that purpose expressly and exclude equally clearly any punitive aspect. If such a limited and precise purpose was thus recognized for countermeasures, the Brazilian delegation saw no reason to refer to "interim measures of protection". Countermeasures were in themselves interim measures of protection: there was, therefore, no need to create a special category of measures to which States could resort without having exhausted the possibilities for peaceful settlement. Lastly, in respect of the principle of proportionality, his delegation could find no fault with the formulation suggested by the Special Rapporteur.

43. Even after the legitimacy of resort to countermeasures had been established, certain obligations remained untouchable, as established in draft article 14. It was clear that peremptory norms of international law and the obligation not to resort to the threat or use of force, which was expressly stated in the Charter of the United Nations, could not be set aside on the grounds of resort to countermeasures. It was necessary, then, to reformulate paragraph 2 of the article which, in its reference to "the threat or use of force", might be considered an interpretation, and an unwelcome one, of the Charter. Careful thought should be given to the question as to whether the prohibition should be limited to the use of armed force or should also apply to other extreme measures of coercion. While it believed that the prohibition should actually be widened, his delegation felt that the provision must be drafted with the utmost care. Excluding erga omnes and erga omnes partes obligations from the list of exceptions followed logically from the very definition of countermeasures, which could be applied only to the wrongdoing

(Mr. Calero-Rodrigues, Brazil)

State. Finally, while the reference to "fundamental human rights" was acceptable, the expression "normal operation of bilateral or multilateral diplomacy" needed to be clarified. He expected the Commission to give careful consideration to paragraphs (b) (i) and (b) (ii) of article 14, paragraph 1.

44. Mr. MIKULKA (Czechoslovakia) welcomed the Commission's progress in elaborating the draft articles on the "substantial" consequences of an internationally wrongful act. In respect of the issue of "instrumental" consequences, considered by the Commission in 1992, he would summarize the major points of Czechoslovakia's position.

45. In view of the rudimentary nature of the centralized system for enforcing international law, individual means of constraint or coercion formed an essential part of such law. The Commission had chosen to designate such means by the word "countermeasures", which encompassed the various measures which could be legitimately taken by an injured State against a State which had committed a wrongful act. While countermeasures were open to abuse, that was no sufficient reason to conclude that they had no place in the legal regime of State responsibility. It was important not to halt the evolution of current legal thinking relating to countermeasures; the aim should rather be to combine all the progressive elements that had emerged in recent practice with a view to formulating clear and precise norms, which would strengthen the guarantees against abuse.

46. The Czechoslovak delegation agreed with the Special Rapporteur that measures of retorsion did not fit into the category of countermeasures. Measures of retorsion under any circumstances constituted licit, albeit unfriendly, measures recourse to which was admissible even where no internationally wrongful act had been committed. The third report also referred to reciprocity measures as a means of coercion. Such measures were not a distinct category but ought rather to be considered as a specific form of countermeasures, the only difference being that reciprocity measures might be intended either to secure cessation of the wrongful act and compliance with the secondary obligation of reparation or to result in simple derogation of the primary obligation between the wrongdoing State and the injured State. The problem was, therefore, to distinguish between reciprocity measures which were essentially "reparatory" in purpose and those which were "derogatory" in purpose.

47. The Special Rapporteur had several times indicated that, at the current stage, the International Law Commission should deal with the question of the consequences of an internationally wrongful act in the context of delicts, and only thereafter consider the question of the consequences of international crimes. The Special Rapporteur referred to the concept of self-defence, which arose only in the context of violations of the prohibition on recourse to force which, because they infringed a peremptory norm of international law, fell within the category of international crimes.

(Mr. Mikulka, Czechoslovakia)

48. With regard to the term "sanctions", his delegation subscribed to the view taken by the Special Rapporteur, who preferred to use that expression solely to designate the measures taken by an international body.

49. Turning specifically to the first three draft articles devoted to countermeasures, he endorsed the finality of draft article 11, which was to reduce possibilities for premature, and thus abusive, resort to countermeasures, by subordinating the right of such resort to the prior definition by the injured State of the conduct that it considered wrongful, to submission of a demand of cessation and of reparation to the State which had committed the act, and to the absence of an adequate response to that demand.

50. With regard to draft article 12, paragraph 1 (a) of which set forth the obligation to exhaust all the amicable settlement procedures available, his delegation shared the views of several members of the Commission who feared that an obligation drafted in such general terms might place the injured State at a disadvantage. Considerable judgement should be exercised in envisaging that obligation, for in the case of persistent wrongful acts, extremely complex situations might arise in which the injured State should not be exposed to interminable proceedings, given that the acts at issue continued to take place.

51. Paragraph 3 of article 12, the purpose of which was to rule out resort to countermeasures not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, should have a more general vocation than that assigned to it by its current wording, which limited its scope to the exceptions set forth in paragraph 2 of the same article.

52. The proportionality which was the subject of draft article 13 was one of the fundamental conditions rendering countermeasures legitimate. Any evaluation of proportionality, whatever the criterion applied, included a substantial component of subjectivity, and thus, an element of uncertainty. The question was thus one which called for more thorough analysis and which the Commission should consider more fully at its next session.

53. Article 14, devoted to prohibited countermeasures, or, in other words, to exceptions to the general rule set forth in article 11, would benefit from being placed immediately after that article. In addition to considerations concerning the order in which the articles were placed, account might also thereby be taken of the concerns of those who wished to see the Commission begin by drafting rules establishing safeguards against possible abuses of recourse to countermeasures.

54. As to the substance, his delegation endorsed the idea expressed in paragraph 1 (b) (iii), that an injured State must not resort, by way of countermeasure, to any conduct which was contrary to a peremptory norm of general international law. Admittedly, the prohibition on the threat or use

(Mr. Mikulka, Czechoslovakia)

of force in contravention of Article 2, paragraph 4, of the United Nations Charter referred to in subparagraph (a), as well as some at least of the rules of international law on the protection of fundamental human rights referred to in subparagraph (b) (i) of paragraph 1, were part of jus cogens. However, the manner in which that prohibition was set forth in Article 14 might give rise to unacceptable a contrario interpretations. From that standpoint, paragraph 1 of Article 14 should be redrafted.

55. Paragraph 1 (b) (ii), which prohibited any conduct which was not in conformity with the rules of diplomatic law, referred to a category of norms that could not be classed on the same level as peremptory norms or those relating to the protection of fundamental human rights. It would be difficult to accept that the prohibition on countermeasures should be equally absolute in such cases. In particular, the prohibition on recourse to reciprocal measures in the framework of diplomatic law did not seem to be justified. As international practice showed, recourse to countermeasures in that sphere, while considerably limited, was not entirely prohibited.

56. Paragraph 1 (b) (iv), which prohibited countermeasures that consisted of a breach of an obligation towards any State other than the State which had committed the internationally wrongful act, represented a useful safeguard against the extensive employment of countermeasures.

57. His delegation subscribed to the view that the prohibition on recourse to the threat or use of force in contravention of Article 2, paragraph 4, of the United Nations Charter included not only armed force but also any extreme measures of political or economic coercion referred to in paragraph 2 of Article 14 which jeopardized the territorial integrity or political independence of the State against which they were taken. One was nevertheless entitled to wonder whether it was appropriate, in a series of draft articles on State responsibility, to provide an interpretation of one of the fundamental provisions of the Charter of the United Nations. It seemed that that paragraph created more problems than it solved.

58. Lastly, with regard to draft article 5 bis, which dealt with the question of a plurality of injured States, his delegation, while subscribing to its content, took issue with the use of the concept of erga omnes obligations in the commentary accompanying that article One gained the impression that the question of a plurality of injured Sta' 's was comparable with that of the infringement of an erga omnes obligation, which was not in fact the case. The problem of a plurality of injured States arose in connection with any regime of multilateral obligations, and not solely with regard to erga omnes obligations. It was on those grounds that it was studied in the context of international delicts. On the other hand, erga omnes obligations were part of jus cogens and consequently related exclusively to international crimes, a question which the Commission had not yet begun to consider.

59. Mrs. Flores (Uruguay) took the Chair.

60. Mr. MOMTAZ (Islamic Republic of Iran) felt that the expression "countermeasures" adopted by the Commission was entirely appropriate in that it implied posteriority or a reaction to a previous action and thus encompassed the full range of means of pressure to which a State injured through a breach of an international obligation by another State could resort in order to ensure that its right was respected.

61. Nevertheless, the legal regime of countermeasures as causes for exoneration from State responsibility could not fail to arouse fears. One wondered whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers. Furthermore, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, in most cases countermeasures in fact merely inflamed relations between the parties to the conflict, thereby rendering them still more intransigent.

62. The fact remained that, in a society at disorganized as the community of States, characterized by the absence of international mechanisms responsible for application of the law, States could not be denied the right to react to breaches of international law which damaged them, by resorting to countermeasures, albeit at the risk of vitiating the very existence of international law. In those circumstances, regulation of the right to resort to countermeasures might offer certain safeguards to the most disadvantaged States and thereby make it possible to address the abuses that might result from the de facto inequality of States, while reducing the number of State initiatives.

63. However, while considerable State practice already existed, it was not possible to rest content with a codification or systematization of the existing rules in that field, for fear of perpetuating a discredited order. On the contrary, the international community must, whenever the need arose, depart from those precedents and embark more resolutely on the road to renewal while working for the progressive development of international law with a view to limiting recourse to countermeasures.

64. The first step would therefore be to give a precise definition of what was understood by an injured State and a wrongful act, and hence to limit the number of States able to claim the right to resort to countermeasures. In many cases, prompted by considerations which were more ideological than legal, States had claimed such a right, setting themselves up as the defenders not only of their own rights, but of international law. That question had arisen in the case concerning Military and Paramilitary Activities in and against Nicaragua. The International Court of Justice had on that occasion accepted the notion of a "legally affected" State, and thus rejected the claim of certain States to be conducting a would-be "actio popularis" on behalf of the international community without having received a specific mandate for that purpose. In that connection, draft article 5 bis, by giving consideration

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only to those cases in which several States had been injured by the same act, was liable to give rise to confusion and to give such claims some legal cover.

65. He welcomed draft articles 12 and 13 submitted by the Special Rapporteur to the extent that they answered the concern expressed as early as 1934 by the Institute of International Law that the use of reprisals should always remain subject to international control and could in no case be exempt from discussion by other States. Both articles were also in line with the commentary to article 30 of the draft articles on the responsibility of States submitted in 1979 by the International Law Commission, which stated that it was only in cases determined by international law that international law granted a State which had been injured by an internationally wrongful act committed against it the faculty of resorting to a countermeasure.

66. Article 12 as such, which was devoted to conditions of resort to countermeasures, did not include the serving of notice among those conditions. Nevertheless, paragraph 1 (b) did stipulate that the injured States should make an "appropriate and timely communication of its intention" to resort to countermeasures. It was important to make a distinction between the serving of notice, which consisted in asking the State guilty of the wrongful act to put an end thereto and, if need be, to make the necessary reparations, and the communication of an intention to resort to countermeasures if such notice remained unheeded. Paragraph 1 (b) made mention only of the latter possibility.

67. Paragraph 2 (b) of the same article, which included cases where the wrongdoing State sought to avoid a peaceful settlement of the dispute between it and the injured State, concerned only those cases where the dispute between those States did not come under the compulsory jurisdiction of the International Court of Justice. In such cases, it was clear that no difficulty arose as to the choice and implementation of settlement procedures. Even though any judicial settlement by definition offered the litigants the advantage of not having to worry about such questions, his delegation was of the view that article 12 should limit itself to solutions involving the International Court of Justice, which was the sole judicial body enabling parties to a dispute to request the Security Council to enforce a judgement, since the Security Council was empowered, if it deemed it necessary, to make recommendations or to decide on measures to be taken to that end. Given those guarantees provided by the Charter of the United Nations, it must be admitted that the right of the injured State to resort to countermeasures in the case in point no longer existed.

68. Draft article 14, which listed the countermeasures to which the injured State could not resort, called for three remarks. First, the prohibition of countermeasures violating the international law rules governing human rights could not be absolute, as was apparent from the approach taken by provision which chose to restrict it to fundamental rights. Nevertheless, it would perhaps be desirable to find a formula for clarifying further the human rights

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categories to be protected. The current wording of the article did not offer sufficient guarantees for protecting certain rights, inasmuch as it might authorize the injured State to engage, as a countermeasure, in intolerable acts, such as mass expulsions of foreigners. In that respect, although a universal prohibition in that area was taboo, several regional instruments, in particular Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Pact of San José of 22 November 1969 and the African Charter on Human and Peoples' Rights expressly prohibited mass expulsions of foreigners except in the cases of a threat to independence or security provided for by the first two texts.

69. Secondly, it was regrettable that none of the provisions of article 14 expressly prohibited countermeasures in case of violation of obligations arising from multinational conventions on protecting the environment, designed to safeguard the environment as part of the common heritage of humanity, since it was unimaginable to resort to countermeasures within the framework of such conventions.

70. Thirdly, article 14, paragraph 2, could be usefully supplemented by a reference to the complete interruption of economic relations and communications, which led to the political and economic destabilization of the State so affected, and which therefore could be decided only by the Security Council under Chapter VII of the Charter.

71. Finally, he hoped that the work of the International Law Commission would proceed more rapidly during its coming session and that that session would provisionally adopt the articles on the juridical regime of countermeasures which, to be acceptable, should be accompanied by firm guarantees in favour of the weaker States.

72. Mr. SALEEM (India) agreed with the view expressed within the Commission that the subject of countermeasures should be treated with extreme caution and under strict conditions of regulations, lest they be used and even abused by the economically strong States against weaker States. The International Law Commission should therefore carefully define the objectives of countermeasures and the necessary preconditions before invoking them and, finally, specify the principles governing their use.

73. Furthermore, the International Law Commission should also carefully provide for the role of peaceful settlement of disputes, the proportionality test, the relevance of interim measures and the scope of the powers and functions of multilateral instruments, bodies and organizations including the Security Council of the United Nations in the maintenance of international peace and security. Above all, it should address the applicability of general principles of international law, obligations of erga omnes character and the rule of jus cogens, which were also relevant to the effort for shaping an acceptable regime governing countermeasures.

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74. In regard to the function of countermeasures, he was of the opinion that, first of all, self-help should generally be discouraged; secondly, respect for law should be promoted; thirdly, disputes should be settled by recourse to one of the various means mutually acceptable to the parties; fourthly, emphasis should be given to the positive and constructive role of countermeasures; fifthly, countermeasures of a punitive nature should be discouraged; sixthly, the territorial integrity and political independence of States should be protected, and lastly, cessation of the wrongful act and due compensation or reparations appropriate to the injury should be obtained. Any countermeasures regime ought expressly to forbid States from encouraging punitive reprisals or countermeasures.

75. Any countermeasures should be in response to the following conditions; first, a wrongful act on the part of a State must exist; second, a clear demand for cessation and reparation should be addressed to the wrongdoing State; third, in the event of disagreement as to the wrongfulness of the act in question and the response demanded, there should be prompt resort to procedures for the settlement of differences if there was reason for such resort. All dispute settlement procedures acceptable to the two parties should be sought out in good faith. Next, due recourse to the provisions of the Charter of the United Nations, to the United Nations Organization and to other authorized multilateral institutions or organizations must be considered; also, the wrongful act itself must be of an unacceptable nature and not a minor or technical one. Finally, the State which had committed the wrongful act should not be able to deny reparation to the injured State or to persist in the alleged violation.

76. Furthermore, once invoked, countermeasures should be pursued within a certain limit; first, the fundamental principle should be that the use of armed force was prohibited in the exercise of countermeasures in response to alleged wrongful acts which did not themselves involve recourse to armed attack or force in the first instance. The principles of the Charter which were laid down in Articles 2 (IV) and 51 should be fully respected; secondly, in order to be recognized as lawful, countermeasures, when resorted to, should conform to principles of international law; thirdly, countermeasures should not be taken or suspended without recourse to an institutional framework and they should provide for some degree of enforcement of the obligations under such a framework; fourthly, countermeasures must always meet the test of reasonableness or proportionality, and thus should be proportional to the seriousness of the alleged wrongful act and should be designed to achieve the objectives of cessation of the alleged wrongful act and settlement of the dispute, if any; fifthly, in no case could the test of proportionality be stretched to justify totally unequal means, methods and measures or to obtain unequal results as compared to the consequences of an alleged wrongful act; sixthly, countermeasures of a political and economic nature should not have the effect of jeopardizing the territorial integrity or political independence of the alleged wrongdoing State. In addition, a strict delimitation should be made between countermeasures stricto sensu and economic and political measures

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which States often take without affecting the rights or obligations of States under international law. However, States should not resort to countermeasures when only their interests are infringed and not their rights. It should also be noted that the use of economic instruments as a strategy and as a countermeasure was strictly governed by several international, bilateral and multilateral agreements and by self-contained regimes.

77. Likewise, responses to violations of human rights should be governed by the applicable international conventions and treaty regimes and should not be brought within the purview of the proposed countermeasures regime.

78. His Government supported the view that any self-help measures which States would take against so-called offending States could not include measures against the States or nationals in violation of principles relating to the protection of human rights and the treatment of foreign nationals.

79. In addition, while regulating the countermeasures regime, caution should be exercised in drawing the proper conclusions with regard to erga omnes obligations and jus cogens principles. Unless the intended limitations could be specified, the Commission could dispense with them. The Commission should also carefully examine the problem of "differently injured States".

80. Finally, his Government strongly supported the view that the countermeasures regime was entirely subject to the principles of the Charter and the powers and functions of the Security Council to meet all contingencies arising from threats to, or real acts affecting, the maintenance of international peace and security.

81. Mr. MAJDI (Morocco) said that he would start with the question of eventually establishing an international criminal court. Morocco recommended realism and prudence on that subject, even though recent events had shown that an international criminal court could have solved many problems and helped to avoid some conflicts. However, such a court would make it possible to standardize prosecution of the most serious international crimes under a uniform law.

82. The benefits of that initiative should not prompt the Commission to forget the complex problems that remained to be overcome, difficulties which the work of the Commission had highlighted. The process could be started by creating a permanent ad hoc court under an international treaty the parties to which would be the ratifying States. The idea that a State party to the statute would not ipso facto be bound to accept the authority of the court was interesting and would make it possible for the statute to obtain broad acceptance. The authority of the court would be accepted on a case-by-case basis and would therefore be at the discretion of States. If the court were to take that shape, only States would be able to bring actions before it and to deal with the most serious international crimes committed by individuals, without denying the concurrent authority of national courts.

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83. The statute of the international criminal court and the Code of Crimes should be separate instruments so as to encourage States to become parties to the statute without being parties to the Code, even though the international criminal court made it easier to prosecute crimes listed in the Code. The court should be composed of independent judges of high moral and professional qualities. They would have to judge only criminals as individuals without seeking to reach the State through such individuals; otherwise, States might justifiably believe that the court was being transformed into an instrument of propaganda or defamation.

84. In conclusion, the Commission and the States should work in perfect harmony on the question of the court. The Commission should take into account the level of acceptance of the idea in the international community, and States should adjust their actions accordingly. The information provided in the report under review described the problems in full detail. Morocco would join with the other States in support of the draft. Moreover, States must be permitted to ponder the proposed instrument, in order to prevent it from assuming a precarious character as a result of being insufficiently thought out.

85. As regards Chapter III of the report, he gave more specific attention to the question of countermeasures. The controversy surrounding that issue was aggravated by the enormous differences existing in international society between militarily strong States and weak States and between rich States and poor States. For some States codification of countermeasures would serve only to crystallize those differences in order to sanctify the wish of the strongest States. This fear was reinforced by the idea that countermeasures were related to a particular historical situation: the period when the majority of the recently independent countries had become much more objects than subjects of international law. His Government was therefore afraid that, by codifying a dubious practice, the primacy of international law would be sacrificed. However, others had expressed the view that international experience reinforced the lesson every day that recourse to countermeasures was a time-honoured practice. Therefore, it would be better to regulate countermeasures and to apply the practice of subjecting them to strict conditions, so as to protect the weakest States and promote respect for law.

86. On that point, his delegation fully endorsed the comments contained in paragraph 133 of the Commission's report. The regulation of countermeasures was a constructive means of promoting respect for the law. If it was to be effective, however, there was first a need to clarify and define the concept of countermeasure and distinguish it from other similar concepts, such as reprisals, sanctions and self-defence - which was a response to a crime, whereas countermeasures were in response to a delict.

87. Secondly, while countermeasures were justified by the aim of halting wrongful acts, there was a further requirement that the alleged wrongdoer should have been explicitly called upon to reconsider the act committed. It

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might even be prepared to make redress if so requested. The alleged author State should therefore receive prior notification of the breach complained of, thereby enabling it to know what obligations it had violated, as the Commission clearly stated.

88. From that twin standpoint, the conditions provided for by the Special Rapporteur in draft article 11 thus offered a fitting response to the problem. They did not, however, resolve everything, and there were at least three points which remained problematical. First, it could be asked what was understood by the term "wrongful act" and who was qualified to judge any act as such. In the same vein, who was competent to say whether a response was adequate or otherwise: was it the injured State, the wrongdoing State or a third party? The second difficulty was knowing whether the injured State was bound to ascertain in advance that one of its rights had been effectively violated before resorting to countermeasures, or whether the latter were sanctioned by the mere bona fide conviction on the part of the State that it had been injured. In the Moroccan view, such a reaction would be excessive unless substantiated by corroborating evidence, such as, for example, the refusal by the alleged wrongdoer to negotiate or to resort to an amicable settlement. The third problem was that the term "injured State" contained in draft article 11 was insufficient; the nature and gravity of the injury sustained should also be specified.

89. Various other aspects of the draft called for comment. First, in sanctioning reaction to a wrongful act, a distinction should be made between the breach of an international obligation giving rise to responsibility and the prejudice which led to the resort to countermeasures. As the Commission stressed, that distinction had practical consequences; if injury was not a prerequisite for the sanctioning of reaction to wrongfulness, any breach of the law could give rise to countermeasures.

90. The condition of "prior exhaustion of dispute settlement procedures" was provided for under Article 33 of the Charter. That condition appeared to favour the wrongdoing State to the detriment of the injured State, given that negotiations could be protracted and that the legal process sometimes took years to complete. It would therefore be unfair to oblige the injured State to refrain from taking countermeasures throughout that entire process, particularly if it was not certain that the other State would in good faith enforce the decision eventually handed down. It would accordingly be advisable to ensure that the exhaustion of peaceful settlement procedures was not only a prerequisite for resort to countermeasures, but also a parallel obligation. The right to take countermeasures would accordingly be suspended as soon as the wrongdoing State agreed to a dispute settlement procedure.

91. Concerning the problem of proportionality, the Commission's report stated that the conduct of the State should be proportionate to the two legitimate aims of countermeasures, namely cessation and reparation. It should be recognized, however, that that principle, despite its importance, was still

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very difficult to apply in practice, since as long as the assessment of the gravity of a wrongful act and of its effects was left to the appreciation of the injured State, abuses would inevitably occur. With a view to limiting that risk, it would therefore be desirable to entrust the assessment to a third party.

92. Mr. GODET (Observer for Switzerland) stated that the legal system applicable to the measures which an injured State could take against a State which had committed an internationally wrongful act was surely one of the most difficult issues in the entire subject of State responsibility. Countermeasures, however, were not the only means of enforcing international law where an obligation under international public law had been breached. Although the international community had not yet succeeded in establishing an effective central system which could wholly guarantee respect for the law, the role of peaceful settlement procedures which offered States the real possibility of finding a satisfactory and final solution to their disputes could not be minimized. That said, the regulation of countermeasures was a constructive means of promoting respect for the law as long as the aim was the cessation of wrongful acts.

93. Bearing in mind the purposes of a system of countermeasures - to resolve rather than exacerbate disputes - a careful limit should be placed on the scope of enforcement of the unilateral means of action to which a State could legitimately resort in order to counter a breach of international law which had caused it prejudice. The admissibility of countermeasures was likely to give rise to abuses and to entail a risk of escalation prejudicial to international stability. It was therefore essential to ensure that countermeasures were subject to particularly strict conditions which would encourage States to settle their grievances by the available amicable settlement procedures and dissuade them from resorting to means which would, in short, constitute the ultima ratio intended to persuade the wrongdoing State to resume compliance with the law.

94. With regard to terminology, most members of the International Law Commission rightly believed that the term "countermeasures" was preferable to the term "reprisals" in that it was a neutral term which, without wholly eliminating the punitive element, more aptly reflected the objective of restoring the symmetrical positions of States by means of negative measures. It might be appropriate to include in the draft articles a definition of countermeasures which stated that they should not be repressive and were intended to provide a remedy aimed at ending a wrongful act and making reparation for the injury caused, and which underlined their temporary nature. Action undertaken in the context of countermeasures should be suspended or withdrawn as soon as the wrongdoing State made reparation for the injury and again complied with international law or participated in good faith in the peaceful settlement of the dispute.

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95. The Special Rapporteur was right in proposing not to deal with the instrumental consequences of crimes until a later stage so as to establish the distinction between crimes and delicts in the context of countermeasures. It was not impossible, however, that the conclusion would be reached in due course that countermeasures for delicts and for criminal acts could not be dealt with separately.

96. In connection with draft article 11, some members of the International Law Commission had thought that besides the two conditions referred to in the draft - the existence of an internationally wrongful act and the absence of adequate response from the wrongdoing State - there should also be a third, namely, that countermeasures could be resorted to only in response to an unlawful act having significant or unacceptable consequences. Switzerland could not accept that view, its own position being that the gravity of the unlawful act should not constitute a criterion of permissibility of countermeasures although it was certainly a decisive factor the injured State would have to take into account when considering the question of the proportionality of the countermeasure to be applied.

97. In connection with the question of establishing the existence of an internationally wrongful act it had been feared that the injured State might let itself be guided by subjective criteria. However, objective indices or indeed objective proof would have been established after the exhaustion of amicable settlement procedures, a preliminary obligation imposed in principle upon the injured State intending to resort to countermeasures. Moreover, a State which based its conduct upon the existence of an internationally wrongful act had to be aware that it might be held responsible if it turned out that no breach of an international obligation had in fact occurred.

98. Lastly, so far as the wording was concerned, draft article 11 would gain in clarity if the expression "adequate response" were spelled out and if language were added to emphasize the temporary nature of the countermeasures, which, in his delegation's view, had to cease as soon as their purpose had been achieved.

99. Turning to draft article 12, he said that the obligation of the exhaustion of all amicable settlement procedures set forth in paragraph 1 (a) was, in his view, the element upon which the entire countermeasures regime was hinged. So long as States had available to them means of settlement, from the simplest forms of negotiation to the most elaborate judicial procedures, recourse to countermeasures could not be justified. Only in the event of failure of a settlement procedure or in the absence of resort to such a procedure for certain permissible and strictly limited reasons - for example, if there were danger in delay - could a State be authorized to employ countermeasures. The use of countermeasures as a means of inducing the wrongdoing State to accept a settlement procedure that would lead to a legally binding decision as to the unlawful nature of an act and as to matters of reparation could not be legitimized. A distinction should be drawn in that connection between countermeasures and measures of conservation.

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100. With regard to paragraph 3 of draft article 12, the Special Rapporteur had acknowledged that the wording was infelicitous. The question raised was whether the countermeasures which were exempt from the requirement of the exhaustion of amicable means of settlement should or should not be subject to the requirement of compatibility with the exigencies of peace and security. In the view of his delegation, all countermeasures had to be governed by the same regime. A general obligation for States parties to a dispute to refrain from any act of countermeasures that might aggravate the situation to the point of threatening the maintenance of international peace and security therefor appeared to be indicated.

101. In connection with draft article 13, there seemed to be general agreement that reciprocal measures should not constitute a special category of countermeasures requiring a separate regime. A breach in one area of the law could thus give rise to a countermeasure which was not necessarily related to the obligation breached. Abandoning the requirement of such a link broadened the scope of possible countermeasures, so that the function of limiting the risk of possible abuses now rested exclusively upon the principle of proportionality. That explained the overriding importance of that principle being respected by the injured State. As several members of the International Law Commission had pointed out, the scope and contents of the proportionality rule deserved, for that reason, to be defined with greater precision. In particular, it was necessary to eliminate the risk of States resorting to lex talionis and to provide clear and, if possible, objective guidelines as to the "proportions" of countermeasures. States should be invited to concentrate their attention above all upon the usefulness of the envisaged measure in terms of the purpose aimed at.

102. Draft article 14 was designed to provide for a possible evolution of the category of countermeasures that might be prohibited. The list of prohibited measures should therefore not be given an exhaustive character. Similarly, the risk of a contrario interpretations - to which, in particular, the reference to Article 2, paragraph 4, of the United Nations Charter with regard to the threat or use of force, at present appearing in square brackets, could give rise - ought to be avoided.

103. With regard to paragraph 2 of the draft article, it seemed to be agreed that extreme measures of political or economic coercion could have consequences as serious as those arising from the use of armed force and should therefore be prohibited. However, the adjective "extreme" appeared unnecessary and even tautologous, since any act of political or economic coercion that jeopardized the territorial integrity or political independence of a State was, of necessity, extreme.

104. As to the question of self-contained regimes (paras. 251 to 259 of the report) - in other words, of regimes characterized by the fact that the obligations they set forth were accompanied by special rules concerning the consequences of their violation - Switzerland saw no reason why an injured

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State unable to obtain the cessation and reparation of an internationally wrongful act by the means provided for in such a regime should be precluded from resorting to countermeasures authorized under general international law. After the exhaustion of amicable settlement procedures, nothing should prevent an injured State from applying countermeasures if the other conditions laid down by the general regime were met.

105. There remained the question of differently injured States, which formed the subject of draft article 5 bis. As the Special Rapporteur pointed out, the bilateral pattern did not hold for the rules of general or collective interest that had to be complied with in the interest of all the States to which they applied. The violation of an erga omnes obligation or of a norm binding upon several States at the multilateral level simultaneously injured all the States bound by that obligation or norm. Since in such a hypothesis the relative injury could vary from one State to another, draft article 5 bis proposed by the Special Rapporteur appeared appropriate. The question could be asked, however, whether, before authorizing a plurality of injured States to react individually, it would not be advisable to encourage them to envisage a collective reaction or to consult among themselves on the countermeasures they proposed to apply, so that their common objective - the cessation and reparation of the internationally wrongful act - might be attained more efficaciously.

The meeting rose at 6.50 p.m.